No. 417

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

LEWYT CORPORATION (Now known as Lewyt Manufacturing Corporation), *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SEYMOUR SHELIFF,
1126 Woodward Bldg.,
Washington 5, D. C.,
Counsel for Petitioner

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Reasons for granting the writ	7
Conclusion	21
Appendix A (Statute involved)	22
Appendix B (Opinion of United States Court of Appeals for the Second Circuit)	29
Appendix C (Judgment of United States Court of Appeals for the Second Circuit)	48

CITATIONS

CASES:

Aramo-Stiftung v. *Commissioner*, 172 F. (2d) 896 (C.C.A. 2d, 1949)	9
Bendheim v. *Commissioner*, 214 F. (2d) 26 (C.C.A. 2, 1954)	12, 13, 14, 18
Birmingham v. *Loetscher Co.*, 188 F. (2d) 78 (C.C.A. 8th, 1951)	9
Chestnut Securities Co. v. *United States*, (Ct. Cl. 1945), 62 F. Supp. 574	16
Commissioner v. *Clarion Oil Co.*, 148 F. (2d) 671 (App. D.C., 1945), *cert. den.* 325 U.S. 881 (1945)	8, 9
George Moore Ice Cream Co. v. *Rose*, 289 U.S. 373 (1933)	15
Glassell, Lillian B., 12 T. C. 232 (1949), acquiesced	18
Lehigh Valley Railroad, 12 T. C. 977 (1949), acquiesced	16
Lemp, William J., Brewing Co., 18 T. C. 586 (1952)	9
Lowenstein, Aaron, Estate of, 12 T. C. 694 (1949) acquiesced	18
Lucas v. *American Code Co., Inc.*, 280 U.S. 445 (1930)	10
Macaulay, Geneviere B., Estate of, 3 T. C. 350 (1944)	18
Manning v. *Seeley Tube and Box Company*, 338 U.S. 561 (1950)	11

Page

McConkey v. *Commissioner*, 199 F. (2d) 892 (C.C.A. 4, 1952), *cert. den.* 345 U.S. 924 (1953) 12, 13, 14, 18
Olympic Radio and Television, Inc. v. *United States*, 108 F. Supp. 109, 124 Ct. Cl. 33 (1952), rehearing denied 110 F. Supp. 600, 124 Ct. Cl. 33 (1953), *cert. granted*, October 14, 1954, (Docket No. 10, October Term, 1954) 7
Rogers, Henry H., Estate of, T. C. Memo. Op., Docket 100026, May 12, 1942 18
Roles v. *Earle*, 195 F. (2d) 346 (C.C.A. 9, 1952), *cert. den.* 344 U.S. 819 (1952) 18
Rosenman v. *United States*, 323 U.S. 658 (1945) ..14, 17, 18, 19, 20
Security Flour Mills Co. v. *Commissioner*, 321 U.S. 281 (1944) 10
Sloane, Henry T., Estate, T. C. Memo. Op., Docket 108473, April 4, 1944 18
Stanard-Tilton Milling Co., 3 T. C. 1026 (1944), acquieseed 11
Standard Portland Cement Co. v. *Commissioner*, 80 F. (2d) 585 (C.C.A. 3, 1935) 13, 15, 18
Stevens, Inc. v. *Johnson*, 115 F. Supp. 310 (S.D. N.Y. 1953) 9
Thomas v. *Mercantile National Bank*, 204 F. (2d) 943 (C.C.A. 5, 1953) 17
United States v. *Detroit Moulding Corporation*, 56 F. Supp. 754 (E. D. Mich., 1944) 11

STATUTES:

Internal Revenue Code of 1939

Section 23(b) 2, 18
23(c) 18
43 9
48(c) 8, 9
56(a) 11, 20
56(d) 20
102(d)(1)(A) 9, 18
122(a) 2
122(b)(1) 2, 3, 12
122(d)(6) 2, 3, 4, 7, 8, 10, 12, 18
271(a) 11, 13
271(a)(1)(B) 2, 5, 18, 20

Page

292 11
322(b)(1) 16, 17
322(d) 18
505(a)(1) 9, 18
507(a) 9
3770(c)—(Section 4(d), Current Tax Payment Act of 1943) 19
3771(a) 16, 17

Judicial Code

28 U.S.C. Section 1254(1) 2
28 U.S.C. Section 1346(a)(1)(ii) 18

MISCELLANEOUS:

I. T. 4054, 1951-2 C. B. 36 18

Informal Internal Revenue Service Rulings

Prentice-Hall Federal Tax Service (1950), Par. 76,331 ..... 16, 17
Prentice-Hall Tax Ideas Service, Par. 8003.3 (page 8060) 17

ARTICLES:

Alexander, Overpayments of Taxes or Government Investment at Six Per Cent; The Problem of the Allowance of Interest, 7 Tax Law Review 231 (1952) 17, 19
American Law Institute (*Goodrich and Redman*) Procedure Before the Bureau of Internal Revenue, 161-69 16
Irins, Phillips and Barker, How to Compute Interest on Refunds and Deficiencies, Prentice-Hall Tax Ideas Service, Par. 8003 19
Salter, Advance Remittances for Proposed Additional Taxes—Jurisdiction of the Tax Court and Related Problems, Taxes Magazine (CCH) June 1954, p. 478 19
Spear, Tax Remittances in Advance of Filing Return or of Assessment, New York University Tenth Annual Institute on Federal Taxation 741 (1952) 16, 17, 19
Tax Barometer (July 24, 1954, Par. 1251) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.

LEWYT CORPORATION (Now known as Lewyt Manufacturing Corporation), *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Lewyt Corporation (now known as Lewyt Manufacturing Corporation) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 14, 1954.

OPINIONS BELOW

The opinion of the Tax Court of the United States, entered September 30, 1952, is reported in 18 T. C. 1245. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 29, has not yet been printed in the official reports.

JURISDICTION

The opinion and judgment of the Circuit Court of Appeals were entered on July 14, 1954. Appendix B, *infra*, p. 29 and Appendix C, *infra*, p. 48. A timely petition for rehearing, filed on July 28, 1954, was denied on August 24, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, in the case of a taxpayer on the accrual basis, excess profits taxes paid within a taxable year constitute excess profits taxes "paid or accrued within the taxable year" under Section 122 (d)(6), Section 122 (a) and Section 122 (b)(1) of the Internal Revenue Code of 1939 ("the Code") dealing with the computation of the net operating loss deduction.

2. Whether under Section 122 (d)(6) and Section 122 (b)(1) of the Code the "tax imposed by Subchapter E of Chapter 2" [the excess profits tax] "accrued within the taxable year" is the excess profits tax computed on the basis of the facts existing at the end of such taxable year or whether it is the excess profits tax ultimately determined to be due after application of a carry-back arising in a later year and after giving effect to other circumstances arising in later years.

3. Whether under Section 122 (d)(6), Section 122 (a) and Section 23 (b) of the Code remittances designated by a taxpayer as "payments" of contested taxes and interest thereon constitute taxes and interest "paid" (and hence also "accrued") within the taxable year in which the remittances were made,[1] and, under Section 271 (a)(1)(B) of the Code, taxes "collected without assessment."

---

[1] In connection with one of the remittances here involved, namely, the remittance of 1943 excess profits taxes, petitioner intends to urge, if certiorari is granted, that such remittance also constituted a "payment" of tax under the doctrine of collateral estoppel.

STATUTE INVOLVED

The applicable portions of the pertinent statute are set forth in Appendix A, *infra*, pp. 22-28.

STATEMENT

The facts, which are not in dispute, are briefly as follows:

Question 1. The taxpayer kept its books and accounts and filed its income and excess profits tax returns for the years here involved on the accrual basis, using a fiscal year ending each September 30.[2] In 1946 the taxpayer admittedly incurred a net operating loss, with the result that no excess profits taxes accrued in that year. However, in 1946 the taxpayer paid the amount of the excess profits tax liability ($861,118.04) accrued and shown on its return for 1945. The Tax Court sustained the Commissioner's determination that the amount of this payment did not constitute excess profits taxes "paid or accrued within the taxable year" under Section 122 (d)(6) and hence could not be added to the taxpayer's net operating loss for 1946. The Circuit Court of Appeals affirmed, ruling that under Section 122 (d)(6) an accrual basis taxpayer could not take account of excess profits taxes *paid* within said taxable year on its liability for a previous year. It is petitioner's contention that such tax payment should be included in its 1946 "net operating loss." (R. 39; Appendix B, *infra*, pp. 38-43.)

Question 2. This question relates to the amount of the taxpayer's 1946 net operating loss which may be carried back to 1945. By the terms of Section 122 (b)(1), as applied to this case, the 1946 net operating loss (the amount of which will be determined by the disposition of question 1) is a carry-back to 1945 only to the extent such loss exceeds the 1944 net income computed (A) with the adjust-

---

[2] Each fiscal year referred to hereafter in this petition is designated simply by the calendar year in which it ended.

ment provided in Section 122 (d)(6) regarding excess profits taxes "paid or accrued within the taxable year" (1944), and (B) by determining the net operating loss deduction for 1944 without regard to the 1946 net operating loss. Unless the 1946 net operating loss exceeds the 1944 net income when computed with these adjustments, there is, of course, no carry-back to 1945.

There is no dispute that the taxpayer's 1944 net income, computed without regard to the 1946 net operating loss and with no adjustment under Section 122 (d)(6), was $584,866.81. The issue under question 2 therefore involves the correct amount of adjustment to 1944 income under Section 122 (d)(6) on account of excess profits taxes "paid or accrued within the taxable year." If petitioner should prevail under question 1, the amount of such adjustment will be $759,916.50, the amount of 1943 excess profits taxes *paid* in 1944, as to which there is no dispute (R. 39). If respondent should prevail under question 1, then the question will arise, as it did below, as to the amount of excess profits taxes accrued in 1944. (Appendix B, *infra*, pp. 43-45.)

Petitioner contends, as it did below, that the amount of excess profits tax accrued in 1944 was $625,561.59, that being the excess profits tax computed on petitioner's original excess profits tax return for such year on the basis of the facts existing at the end of such year (R.189). The Circuit Court of Appeals held, however, that the excess profits tax which accrued in 1944 was $280,540.33, the amount of excess profits tax finally determined to be due for 1944 *after* giving effect to a net operating loss carry-back from 1946 of $164,326.38 and other events arising after the close of the year 1944. (R. 16, 20.) Since the 1946 net operating loss found by the Court below ($164,326.38) did not exceed $304,326.48 [that amount being the 1944 net income *before* the 1946 net operating loss carry-back ($584,866.81) reduced by the Section 122 (d)(6) adjustment as computed by the Court below ($280,540.33)], the Court's opinion resulted in there being no net operating

loss carry-back from 1946 to 1945. (Appendix B, *infra*, pp. 44-45.)

Question 3. This issue involves the question of whether certain remittances made during 1947 of contested excess profits taxes for the years 1943, 1944 and 1945 and of interest on contested taxes for such years constituted "payments" of tax and interest. The Court below held that they did not on the ground that the remittances were made while petitioner was still contesting its liability.

A holding that these remittances did constitute payments would permit the addition to petitioner's net operating loss for 1947 of the amount of such remittances regardless of whether petitioner prevails with respect to question 1 for, as recognized by the Courts below, a contested tax liability, in the case of an accrual basis taxpayer, accrues in the year of payment or settlement, whichever is earlier. Therefore, one effect of the holding of the Court below that these remittances did not constitute payments was to preclude petitioner from adding the amount of these remittances to its 1947 net operating loss for carry-back purposes. (Appendix B, *infra*, pp. ~~38-43.~~ 32-38)

The holding on this point also led the Court below to conclude (Point 5 of its opinion, Appendix B, *infra*, p. 46) that the Commissioner had correctly determined petitioner's excess profits tax deficiency for 1945 under Section 271 (a)(1)(B) even though he had not given the petitioner credit against its excess profits tax liability for one of such remittances, namely, the remittance made in 1947 with respect to 1945 excess profits tax liability.

The facts pertinent to the question of whether these remittances constituted payments are briefly as follows: Prior to 1947 a dispute arose between the taxpayer and the Commissioner as to the taxpayer's 1943 tax liability. In 1946, the Commissioner issued a statutory notice asserting an excess profits tax deficiency for 1943 in the amount of $194,992.51. The taxpayer thereupon petitioned the Tax Court to redetermine such deficiency. Conferences were

held for the purpose of attempting to settle the matter without trial, and at the conclusion of a conference on September 26, 1947, petitioner's certified public accountant believed agreement had been reached between authorized representatives of the Government and petitioner as to a basis of settlement. Accordingly, he computed the amount of additional taxes due in accordance with the supposed settlement and, on September 29, 1947, the taxpayer remitted by check to the Collector of Internal Revenue $141,618.13 on account of additional 1943 excess profits tax liability, plus an additional amount as interest on contested 1943 taxes. The letter of transmittal stated that the remittance represented "payment for the additional tax as computed by us." (R. 39-40, 42, 142; Appendix B, *infra*, pp. 32-33.)

Further conferences were subsequently held and, in 1948, a settlement agreement was reached. The amount of 1943 excess profits tax liability computed under the settlement was $140,147.87, or $1,470.26 less than the amount estimated by the taxpayer's accountant to be due on the basis of such settlement when he thought it had been reached in September 1947. The settlement agreement was consummated by a stipulation entered into between the taxpayer and the Commissioner in the 1943 Tax Court case showing excess profits "tax paid" of $141,618.13, with the $1,470.26 designated as an "overpayment." The Tax Court in that case entered judgment reciting that there was an "overpayment" in excess profits tax for 1943 in that amount. (R. 40-41, 134-136; Appendix B, *infra*, p. 33.)

Since the disposition of the issue present in 1943 affected the tax liability for 1944 and 1945 as well, the taxpayer also made a remittance on September 29, 1947 with respect to its liability for excess profits taxes and interest on taxes for such years and in the transmittal letter referred to the remittance as "payment of additional taxes" for 1944 and 1945. At the time of this remittance an audit of the taxpayer's 1944 and 1945 returns was in

process but no deficiency notice had been issued. However, there was outstanding at such time an unpaid assessment with respect to 1944 excess profits taxes (R. 39, 89-90, 189, 203) in an amount in excess of the remittance ($49,953.38) made with respect to 1944 taxes. (R. 41, 144; Appendix B, *infra*, pp. 33-34.)

The Collector promptly presented the taxpayer's checks of September 29, 1947 for payment to the credit of the Treasurer of the United States (R. 143, 145), and the Collector on his own motion entered the amount of the remittances in his "Suspense Account" (R. 40-41; Appendix B, *infra*, pp. 33-34), a bookkeeping account maintained to reflect remittances received when no unpaid assessments are outstanding. The remittances were shown by the taxpayer on its books and on its 1947 income tax return as charges to earned surplus. (R. 42; Appendix B, *infra*, p. 34.)

REASONS FOR GRANTING THE WRIT

Question 1. A. The Circuit Court of Appeals' decision declining to permit an accrual basis taxpayer to make an adjustment under Section 122 (d)(6) for excess profits taxes actually paid in the taxable year is in direct conflict with the decision of the Court of Claims in *Olympic Radio and Television, Inc.* v. *United States*, 108 F. Supp. 109, 124 Ct. Cl. 33 (1952), rehearing denied 110 F. Supp. 600, 124 Ct. Cl. 33 (1953). The Court below frankly stated that the *Olympic* case "squarely upholds the position of the taxpayer as to the meaning of 'paid or accrued' in § 122 (d)(6)", but found itself "unable to agree with the Court of Claims." (Appendix B, *infra*, p. 43.)

Certiorari was granted by this Court in the *Olympic Radio* case (Docket No. 10, October Term, 1954) on October 14, 1954. The petition for certiorari of the United States therein assigned conflict with this case as a basis for grant of certiorari and stated that the question involved is of "recurrent importance in the administration of the tax

laws", the same issue being "presented in at least 35 (and probably more) other cases now pending before the Court of Claims, the district courts, the Tax Court, and the Treasury, involving a total of at least $27,000,000 in taxes, plus interest."

B. The result of the decision below will be to discriminate against accrual basis taxpayers in favor of cash basis taxpayers. Usually, a taxpayer cannot *incur* or *accrue* in the same year both an excess profits tax liability and a net operating loss because taxes based on income are not ordinarily accrued in a loss year. But a taxpayer necessarily must *pay* an excess profits tax in a year subsequent to the year in which such liability arises. Hence, a cash basis taxpayer will frequently make an excess profits tax payment in the year of a net operating loss. Thus, under the decision of the Court below, accrual basis taxpayers ordinarily cannot obtain relief under Section 122 (d)(6) whereas cash basis taxpayers ordinarily can. The Court below acknowledged that such may well be the result of its decision and stated that "we would not be candid if we failed to recognize the force of what the taxpayer argues here." (Appendix B, *infra*, p. 42.)

The Court stated, however, that it could not take account of these equities without "ignoring the plain mandate of the statute." (Appendix B, *infra*, p. 42.) The "plain mandate" which the Court felt constrained to follow was the definition in Section 48 (c) of the Code that "when used in this Chapter [Chapter 1, entitled "Income Tax"], the terms 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part." But the definition in Section 48 (c) hardly constitutes a mandate in this case. Other courts (including the Second Circuit itself) have construed another section of the Code containing language virtually identical with that of Section 122 (d)(6), in the manner contended for by petitioner here. *Commissioner* v. *Clarion Oil Co.*, 148 F. (2d) 671 (App. D. C.,

1945), *cert. den.* 325 U. S. 881 (1945); *Aramo-Stiftung* v. *Commissioner*, 172 F. (2d) 896 (C.C.A. 2d, 1949); *Birmingham* v. *Loetscher Co.*, 188 F. (2d) 78 (C.C.A. 8th, 1951); *William J. Lemp Brewing Co.*, 18 T. C. 586 (1952).[3]

These cases arose under the personal holding company provisions of the Code, Section 505 (a)(1) of which provides for an adjustment to net income for "excess profits taxes paid or accrued during the taxable year." The Court below sought to distinguish these cases by erroneously assuming that the definition contained in Section 48 (c) was inapplicable to the personal holding company cases which arose under Chapter 2, stating (Appendix B, *infra*, p. 41):

> "Chapter 2 contains no provisions comparable to § 48 (c) and § 43 of Chapter 1 defining the phrase 'paid or accrued.'"

In so stating, the Court below appears to have inadvertently overlooked Section 507 (a) of the Code, which provides that:

> "The terms used in this subchapter [subchapter A of Chapter 2 dealing with personal holding companies] shall have the same meaning as when used in Chapter 1."

The personal holding company line of cases held that the normal meaning of the term "paid or accrued", that is, *either* paid *or* accrued, will be applied when necessary to carry out the intent of the statute. Thus, on the basis of considerations very similar to those urged by the petitioner here—the avoidance of discrimination between cash and accrual basis taxpayers—the Court, in the leading case in this line of decisions, the *Clarion Oil* case, interpreted the statute as contended for by petitioner here without

---

[3] To the same effect is *Stevens, Inc.* v. *Johnson*, 115 F. Supp. 310 (S.D. N.Y. 1953), arising under the parallel provision in Section 102(d)(1)(A).

ignoring any statutory mandate, the Court saying (at p. 676 of 148 F. (2d)):

> "* * * Nor did Congress intend that the taxpayer on an accrual basis who entered in his books an arbitrary amount as 'reserve for taxes,' should be in a better position than the taxpayer on a cash basis, * * *."

Similar reasoning would appear to require a holding that would not place a cash basis taxpayer in a better position than an accrual basis taxpayer under Section 122 (d)(6).

Since virtually identical statutory provisions and considerations of equity are involved in this case as were involved in the personal holding company cases, there is a conflict in principle between the decision below and the decisions in such cases, which should be resolved by this Court.

Question 2. This question bears on the determination of the amount of the 1946 net operating loss which may be carried back to 1945. This issue is closely related to that under question 1 and a disposition of both questions appears essential to clarify the meaning of Section 122 (d)(6). Having held on this point (as it did under question 1) that an accrual basis taxpayer could take into account under Section 122 (d)(6) only taxes "accrued" within the taxable year because of the "explicit direction" of the statute, the Court below thereupon paradoxically disregarded the accepted meaning of the word "accrued" in order to carry out what it regarded as the "manifest purpose" of the statute. (Appendix B, *infra*, p. 45.) Specifically, the Court below refused to follow the rule that in determining accruals within a taxable year events occurring thereafter may not be taken into account. *Lucas* v. *American Code Co., Inc.*, 280 U. S. 445 (1930); *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281 (1944). That doctrine, of course, requires that, as contended for by petitioner below, the tax accrued within a taxable year (1944) be deemed to be the tax as reported during that year despite the

occurrence of later events which change the amount of tax ultimately found due [*Stanard-Tilton Milling Co.*, 3 T. C. 1026 (1944), acquiesced; *United States* v. *Detroit Moulding Corporation*, 56 F. Supp. 754 (E. D. Mich., 1944)], and not, as held by the Court below, the tax finally determined to be due after the occurrence in later years of net operating losses and other events.[4]

Indeed, the assumed statutory purpose by which the Court below justified disregarding the accepted meaning of the word "accrued" is a purpose specifically negatived by the very statutory language in issue. Thus, the Court below stated as its view that the determined income for the taxable year must be "matched" against the determined excess profits tax based thereon[5] (Appendix B, *infra*, p. 45)

---

[4] The Court stated, at the outset of its discussion of this point, that the excess profits tax which was "imposed" for 1944 was $280,540.33 (Appendix B, *infra*, p. 44), that being the excess profits tax on the 1944 income *after* application of the 1946 net operating loss carry-back. Petitioner does not interpret the Court's opinion as relying on this point since later in summarizing its opinion the Court said: "The excess profits taxes which *accrued* for 1944 were $280,540.33." (Appendix B, *infra*, p. 45) However, to the extent that the Court gave any weight to its statement that the excess profits tax *imposed* for 1944 was $280,540.33 (the tax after carry-back), then a conflict in principle with *Manning* v. *Seeley Tube and Box Company*, 338 U. S. 561 (1950) would seem to exist, and would constitute a further ground for granting this petition. In the *Seeley Tube and Box* case it was held that under Sections 271(a) and 292 of the Code (dealing with the computation of interest) the term "tax imposed" means the tax originally due for a taxable year even though such tax liability is subsequently reduced or wiped out by carry-backs. See also Section 56(a) of the Code which requires a taxpayer to pay the "tax imposed by this chapter" on the fifteenth day of the third month following the close of the taxable year, at which time, of course, no carry-back from a subsequent year could have arisen.

[5] Actually, the result reached by the Court below is inconsistent with the theory advanced by it of matching income with the tax *based thereon*. The Court below matched determined income for 1944 *before* the net operating loss carry-back from 1946 ($5 4,866,81) with determined excess profits tax ($280,540.33) computed on the basis of the determined income *after* giving effect to such net operating loss carry-back ($420,540.43; R. 16-20).

if Section 122 (b)(1) and Section 122 (d)(6) are to be construed in accordance with what the Court below conceived to be the statutory purpose. But this could hardly have been the statutory purpose since the Code admittedly does not provide for such matching in the case of a cash basis taxpayer, where the excess profits tax "paid" for purposes of these sections is computed upon the income of another year and not upon the basis of the income for the year against which it is "matched."

The Court's opinion will make it mathematically impossible for any accrual basis taxpayer (in contrast to a cash basis taxpayer) ever to obtain any benefit from the (d)(6) adjustment under Section 122 (b)(1). Under question 1 the Court below felt compelled by the statutory language to reach a discriminatory result. Paradoxically, under question 2 the Court below deviated from the accepted meaning of the statutory language to reach such a result.

Question 3. A. Questions 1, 2, and 3, are so closely related that a disposition of all three questions is necessary to determine the meaning of Section 122(d)(6). All three questions involve the meaning of the words excess profits taxes "paid or accrued within the taxable year" as used in Section 122 (d)(6). Question 1 deals with the issue of whether an accrual basis taxpayer can take into account taxes "paid"; question 2 deals with the issue of when taxes "accrue"; and question 3 deals with the issue of when taxes are "paid."

B. The Court's decision on question 3 is in conflict with the decision of the Fourth Circuit Court of Appeals in *McConkey* v. *Commissioner*, 199 F. (2d) 892 (1952), *cert. den.* 345 U. S. 924 (1953), with the decision of another panel of judges[6] in the Second Circuit in *Bendheim* v. *Commis-*

[6] The instant case was decided by Judges Clark, Hincks and Harlan; the *Bendheim* case was decided by Judges Clark, Frank and Medina.

sioner, 214 F. (2d) 26 (June 9, 1954),[7] and with the decision of the Third Circuit Court of Appeals in *Standard Portland Cement Co.* v. *Commissioner*, 80 F. (2d) 585 (1935), in which cases remittances similar to those here involved were held to be "payments" or "collections without assessment."

These three cases involved the precise issue taken up in Point 5 of the opinion of the Court below, Appendix B, *infra*, p. 46, namely, whether a remittance constituted a "payment" or "collection without assessment" within the meaning of the definition of "deficiency" in Section 271 (a) of the Code. In the *Standard Portland Cement* case, and in the instant case with respect to the remittance made for 1945, the definition controlled the amount of "deficiency" finally determined by the Tax Court after hearing and deciding the substantive issues involved, the remittances in both cases having been made *after* the filing of a Tax Court petition. In the *McConkey* and *Bendheim* cases, where the remittances were made *prior* to the filing of a Tax Court petition, the definition controlled whether the Tax Court had jurisdiction, its jurisdiction obtaining only when there is a "deficiency" at the time the petition is filed.

The cited decisions are also in conflict with the holding of the Court below in Point 1 of its opinion (Appendix B, *infra*, p. 32) that the remittances of 1943, 1944 and 1945 excess profits taxes here in issue did not constitute payments of excess profits taxes for purposes of Section 122 (d)(6). (Appendix B, *infra*, p. 35.) The lower Court treated the issue under Point 5 as the same as that under Point 1 (p. 46, *infra*), since a "payment" for one purpose

---

[7] In commenting on the opinion in the instant case, the Tax Barometer (July 24, 1954, par. 1251) stated: "The Second Circuit here reaches a conclusion contrary to that in the recent *Bendheim* case in a similar situation."

is a payment for all purposes under this Court's decision in *Rosenman* v. *United States*, 323 U. S. 658 (1945).[8]

The Court below recognized that the factor it relied on to hold the remittances in the instant case not to be payments—the continuance of the contest as to liability—was also present in the *McConkey* and *Bendheim* cases. However, it sought to distinguish those cases on the ground that after the remittances had been made in such cases "the Collector * * * stated a proposed deficiency [issued a 90-day letter] not in excess of the deposit, thereby indicating unequivocally an acceptance" of the taxpayers' "implicit" offers "to the Collector that he apply the amount to the discharge of a tax liability in whole or in part." (Appendix B, *infra*, p. 46.) But this distinction is untenable since the decisions in the *McConkey* and *Bendheim* cases were in no way based on the theory that issuance of the 90-day letters constituted acceptance of offers previously made. To the extent the 90-day letters had any relevance to the "implicit offers" of the taxpayers in the *McConkey* and *Bendheim* cases,[9] they constituted *rejections* and not *acceptances* thereof. As set forth by the Courts in the *McConkey* and *Bendheim* cases, the 90-day letters failed to reflect the remittances in the computation of the deficiencies there involved, the Commissioner having "overlooked" such remittances in each case, so that his issuance of the 90-day letters was "erroneous" and a "mistake." See 199 F. (2d) at 895 and 214 F. (2d) at 27 and 28. The opinions in both these cases make it plain that payments had been made as a matter of law at the time of the remittances and that

---

[8] "It will not do to treat the same transaction as payment and not as payment, whichever favors the Government." 323 U. S. at 661.

[9] The theory of the Court below is based upon a misconception as to the manner in which the Commissioner of Internal Revenue exercises his collection functions. The 90-day letters in the *McConkey* and *Bendheim* cases were *not* issued by the Collector (as stated by the Court below) but on behalf of the Commissioner by the Internal Revenue Agent in Charge, an official without authority to accept remittances.

the payments did not *lose* their character as such by reason of the subsequent erroneous issuance of 90-day letters. Stated otherwise, the remittances in these cases were held to be payments not because the 90-day letters accepted them as such but in spite of the fact that the 90-day letters failed to treat them as such.

Finally, it is important to note that the Court below did not discuss at all the *Standard Portland Cement* case, *supra*, a decision as to which the "acceptance of offer" distinction made by the Court below could have no conceivable pertinence since the 90-day letter in that case, like the one here involved, had been dispatched before the remittance was made. The material facts of that case are identical with those here and the decision of the Court below is clearly in conflict with that decision.

C. The decision of the Court below is not only in conflict with the three decisions just discussed, but it is unsound in theory and inconsistent with principles accepted by the lower Court as a basis for its decision, as well as principles accepted by the Internal Revenue Service. Stating that a remittance of tax could not constitute a payment of tax unless it satisfied an asserted tax liability, the Court below went on to hold that satisfaction of an asserted liability in advance of assessment [10] did not occur when a remittance was made while a contest continued. That the accepted meaning of the term "payment" includes the payment of a contested tax liability is indicated by the familiar phrase "payment under protest." [11] The

---

[10] Actually, as appears at p. 7, *supra*, and as pointed out by petitioner to the Court below, one of the remittances here involved, the remittance of 1944 excess profits taxes, was made when there was an unpaid assessment outstanding in excess of the remittance. Although the Court indicates that "satisfaction" of a liability in any event follows "from payment of a tax assessed", it failed to discuss this point in its opinion.

[11] "At common law and for many years under the federal statutes, *protest at the time of payment* was a condition precedent to the recovery of a tax." (Italics supplied), Cardozo, J. in *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373 (1933).

novel suggestion by the Court that a remittance made when a taxpayer is contesting a liability cannot constitute a satisfaction of a liability or a payment is negatived by the very cases [*Chestnut Securities Co.* v. *United States* (Ct. Cl. 1945), 62 F. Supp. 574, and *Lehigh Valley Railroad*, 12 T. C. 977 (1949), acquiesced] which the Court relied upon (see Appendix B, *infra*, p. 34) as establishing the doctrine that accrual takes place no later than the year of "payment." For example, in the *Chestnut Securities* case, at p. 576, the Court said:

> "But if a liability is asserted against him and he pays it, *though under protest*, and though he promptly begins litigation to get the money back, the status of the liability is that it has been *discharged by payment*." (Italics supplied.)

Although the lower Court purports to find support for its view in a ruling of the Internal Revenue Service (Appendix B, *infra*, p. 37), the ruling cited by the Court (see Prentice-Hall Federal Tax Service (1950) Par. 76,331) specifically indicates that a remittance in advance of assessment may constitute a payment even though the taxpayer continues to contest his tax liability.

D. Since the making of voluntary payments before assessment is a practice commonly engaged in to stop the running of interest while a taxpayer contests his liability,[12] the decision of the Court below will affect and create confusion in a wide variety of important and recurring situations under many sections of the Internal Revenue Code in addition to those directly involved in this case.[13] As

---

[12] American Law Institute (Goodrich and Redman), Procedure before the Bureau of Internal Revenue, 161-69.

[13] "Two of the most important current problems in the administration of our federal tax system center around the question when a tax is considered 'paid' or 'overpaid' for purposes of Section 322(b)(1) and for purposes of Section 3771(a) of the Internal Revenue Code." *Spear*, Tax Remittances in Advance of Filing Return or of Assessment, New York University Tenth Annual Institute on Federal Taxation 741 (1952).

earlier indicated, this Court has ruled (*Rosenman* v. *United States, supra*) that a tax payment for one purpose of the Internal Revenue Code is a tax payment for all purposes of the Code. One of the most important and frequently litigated situations involving the question of what constitutes a tax payment is whether a taxpayer is entitled to interest on a refund of an "overpayment" under Section 3771 (a) of the Code.[14] It has been the policy of the Internal Revenue Service to allow interest on certain "overpayments" made in advance of assessment despite the fact that the taxpayer is contesting his liability at the time he makes the remittance,[15] a practice which cannot be squared in principle with the decision of the Court below. If the decision below is allowed to stand, the continuance of this practice will be jeopardized and doubt will be cast on the propriety of past allowances of interest.

The opinion of the Court below will also cause uncertainty in a number of other situations which involve the question of whether a payment of tax has been made. Among such situations are the following: whether a claim for refund was filed within two years from the time the tax was paid, a period of limitation under Section 322 (b) (1) (*Rosenman, supra; Thomas* v. *Mercantile National Bank*, 204 F. (2d) 943 (C.C.A. 5, 1953)); [16] whether excess profits taxes have been paid within the taxable year for

---

[14] The numerous cases on this point are collected in *Spear, supra*, note 13, and in *Alexander*, Overpayments of Taxes or Government Investment at Six Per Cent: The Problem of the Allowance of Interest, 7 Tax Law Review 231 (1952).

[15] Informal rulings published in Prentice-Hall Federal Tax Service (1950), Par. 76,331 and in Prentice-Hall Tax Ideas Service at Par. 8003.3 (page 8060).

[16] References in this paragraph are to the Internal Revenue Code of 1939. Similar problems arise under the Internal Revenue Code of 1954.

The cases cited in this paragraph are intended to illustrate some situations where a question can arise as to whether a "payment" occurred; it is not intended to imply that the material facts surrounding the remittances in such cases are identical to those here.

purposes of the adjustments under Section 122 (d) (6) (as in this case) and the parallel provisions in Section 505 (a) (1) (dealing with personal holding companies) and Section 102 (d) (1) (A) (dealing with unreasonable accumulation of surplus); whether, as in this case, interest on taxes has been paid within the taxable year for purposes of the deduction under Section 23 (b) of the Code; whether the taxes specified in Section 23 (c) are deductible as paid within the taxable year (*Lillian B. Glassell*, 12 T. C. 232 (1949), acquiesced; *Estate of Aaron Lowenstein*, 12 T. C. 694 (1949), acquiesced; I. T. 4054, 1951-2 C. B. 36); whether payments or "collections without assessment" have been made under Section 271 (a) (1) (B) for purposes of determining whether the Tax Court has jurisdiction (*McConkey* and *Bendheim, supra*) or of determining the proper amount of deficiency to be entered by the Tax Court (*Standard Portland Cement Co., supra; Henry T. Sloane Estate*, T. C. Memo. Op., Docket 108473, April 4, 1944); and whether the Tax Court may find an "overpayment" under Section 322 (d) (*Estate of Henry H. Rogers*, T. C. Memo. Op., Docket 100026, May 12, 1942; *Estate of Genevieve B. Macaulay*, 3 T. C. 350 (1944)).[17]

E. In attempting to determine when a payment of tax was made, lower courts voiced a wide variety of views so that in 1944 this Court granted *certiorari* in the *Rosenman* case, *supra*, to "resolve an asserted conflict of decisions in the lower courts." Since this Court decided the *Rosenman* case a renewed conflict of opinion has broken out in the federal courts, the latest manifestation of which is the conflict described above between this case and the *McConkey, Bendheim* and *Standard Portland Cement* cases, *supra*. The conflict in the "tax payment" cases has been

[17] See, also, *Roles* v. *Earle*, 195 F. (2d) 346 (C.C.A. 9, 1952), *cert. den.* 344 U. S. 819 (1952), involving the question whether the tax was *collected* by a collector of internal revenue who was no longer in office when suit was brought against the United States under former Section 1346 (a) (1) (ii) of 28 U.S.C.

the subject of much discussion in tax journals, where the cases are collected. *Spear*, Tax Remittances in Advance of Filing Return or of Assessment, New York University Tenth Annual Institute on Federal Taxation 741 (1952);[18] *Alexander*, Overpayments of Taxes or Government Investment at Six Per Cent; The Problem of the Allowance of Interest, 7 Tax Law Review 231 (1952);[19] *Salter*, Advance Remittances for Proposed Additional Taxes—Jurisdiction of the Tax Court and Related Problems, Taxes Magazine (CCH) June 1954, p. 478; *Irvins, Phillips and Barker*, How to Compute Interest on Refunds and Deficiencies, Prentice-Hall Tax Ideas Service, Par. 8003 at Par. 8003.3 (pp. 8057-8061). In part, the conflict appears to be attributable to a difference of view as to the effect of Section 4 (d) of the Current Tax Payment Act of 1943 (§ 3770 (c) of the Code), a provision of law which this Court stated need not be considered in the *Rosenman* case, presumably because the transactions there in issue occurred before the enactment of that statute. And, more fundamentally, there is a divergence of opinion as to the meaning of the *Rosenman* decision.

F. The Court below misconceived and misinterpreted the scope and intent of the opinion of this Court in the *Rosenman* case. While the Court below did not "read *Rosenman* to foreclose treating as a tax payment any remittance made prior to assessment",[20] (Appendix B, *infra*, p. 36) it thought that case "supported the view" that a remittance

---

[18] "It appears that conflict in the decisions is not being clarified by the courts." *Spear*, at p. 775.

[19] "At present the courts are in a state of disagreement; to a large extent, the result of a case involving the allowance of interest may depend on the proper selection of the forum." *Alexander*, at p. 231.

[20] The view of the Court below that the *Rosenman* case did not attempt to lay down a general rule that a remittance made before assessment could not constitute a tax payment is not only borne out by the opinion in that case but is required by provisions of the Code which make it evident that a payment of tax may be due

must satisfy a liability in order to be treated as a payment, a test which the Court below concluded was not met here for the reasons discussed in sections B and C above. In suggesting that the *Rosenman* case had even this limited applicability, the Court below, petitioner submits, misconceived the rationale and scope of that decision. The *Rosenman* case involved an overpayment, as to which obvious difficulties arise in characterizing the remittance as a payment of *tax*. No such difficulties exist with respect to remittances necessary to meet the correct amount of tax liability, in which class fall virtually the entire amount of the remittances here involved.[21] The decisions of the Courts below make this case the only one, so far as petitioner is aware, in which a remittance designated as a payment of tax and necessary to meet the taxpayer's liability as ultimately determined has not been accepted at its face value as a payment.

This holding, petitioner submits, is entirely inconsistent with the basic rationale of the *Rosenman* opinion. While this Court in the *Rosenman* case held the overpayment there involved not to be a payment for purposes of starting the running of the statute of limitations, or of securing interest on refunds, it stated that the remittance of which the overpayment was a part was effective to stop the running of interest against the taxpayer on the amount eventually found owing, thereby indicating in effect that the remittance was a payment of tax when made to the extent

---

and may be made in advance of assessment. Under Section 56 (a) the "tax imposed by this chapter" (that is, the tax liability as finally determined) is generally payable on March 15 even though assessment of a deficiency cannot occur until a later date. In any event, Section 56 (d) provides that "A tax imposed by this chapter * * * may be paid * * * prior to the date prescribed for its payment." Further, Section 271 (a)(1)(B) provides for the determination of a deficiency by crediting amounts "collected without assessment."

[21] All of the remittances here involved except $1,470.26 of the remittance of 1943 excess profits taxes (p. 6, *supra*) were necessary to meet the taxpayer's correct tax liability.

it was necessary to meet the taxpayer's finally determined tax liability. Since the Court at the same time made it clear that a payment for one purpose is a payment for all purposes, it is evident that the Court's holding is limited to *over*payments. It has no application to remittances, such as are here involved, of the correct amount of taxes. Of course, no problems of limitations or interest on refunds can arise in the case of such remittances.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

SEYMOUR SHERIFF,
1126 Woodward Bldg.,
Washington 5, D. C.,
Counsel for Petitioner

October, 1954

APPENDIX A

Statute Involved

INTERNAL REVENUE CODE OF 1939:

"SEC. 21. NET INCOME.

"(a) DEFINITION.—'Net income' means the gross income computed under Section 22, less the deductions allowed by section 23.

* * * * * * * * * * *"

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

* * * * * * * * * * *

"(b) INTEREST.—All interest paid or accrued within the taxable year on indebtedness, * * *

"(c) TAXES GENERALLY.—

"(1) ALLOWANCE IN GENERAL.—Taxes paid or accrued within the taxable year, except—

* * * * * * * * * * *

"(s) NET OPERATING LOSS DEDUCTION.—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * * * * * * * * * *"

"SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

"The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred,' dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *"

"SEC. 48. DEFINITIONS.

"When used in this chapter—

* * * * * * * * * * *

"(c) 'PAID OR INCURRED', 'PAID OR ACCRUED'.—The terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * * * * * * * * *"

"SECTION 56. PAYMENT OF TAX.

"(a) TIME OF PAYMENT.—The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year."

(NOTE: This language was effective during the taxable years. Subsequent amendment by the 1950 Revenue Act does not change this language.)

* * * * * * * * * *

"(d) VOLUNTARY ADVANCE PAYMENT.—A tax imposed by this chapter or any installment thereof, may be paid, at the election of the taxpayer, prior to the date prescribed for its payment.

* * * * * * * * * * *"

"SEC. 102. SURTAX ON CORPORATIONS IMPROPERLY ACCUMULATING SURPLUS.

* * * * * * * * * *

"(d) DEFINITIONS.—As used in this chapter—

"(1) SECTION 102 NET INCOME.—The term 'section 102 net income' means the net income, computed without the benefit of the capital loss carry-over provided in section 117(e) from a taxable year which begins after December 31, 1940, and computed without the net operating loss deduction provided in section 23(s), minus the sum of—

"(A) TAXES.—Federal income, war-profits, and excess-profits taxes (other than the tax imposed by Subchapter E of Chapter 2 for a taxable year beginning after December 31, 1940), paid or accrued during the taxable year, to the extent not allowed as a deduction by section 23, but not including the tax imposed by this section or a corresponding section of a prior income-tax law.

* * * * * * * * * *"

"SEC. 122. NET OPERATING LOSS DEDUCTION.

"(a) DEFINITION OF NET OPERATING LOSS.—As used in this section, the term 'net operating loss' means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

"(b) AMOUNT OF CARRY-BACK AND CARRY-OVER.—

"(1) NET OPERATING LOSS CARRY-BACK.—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4) and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss."

(NOTE: This language was adopted by Section 153 of the 1942 Revenue Act, effective for the taxable years. Subsequent amendments by 1950 and 1951 Revenue Acts do not change the substance of the pertinent provisions.)

• • • • • • • • • • •

"(c) AMOUNT OF NET OPERATING LOSS DEDUCTION.—The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d), (1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (computed without such deduction and without the credits provided in section 26(h) and (i));

"(d) EXCEPTIONS, ADDITIONS, AND LIMITATIONS.—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

"(1) The deduction for depletion shall not exceed the amount which would be allowable if computed without reference to discovery value or to percentage depletion under section 114(b), (2), (3), or (4);

"(2) There shall be included in computing gross income the amount of interest received which is wholly exempt from the taxes imposed by this chapter, decreased by the amount of interest paid or accrued which is not allowed as a deduction by section 23(b), relating to interest on indebtedness incurred or continued to purchase or carry certain tax-exempt obligations;

"(3) No net operating loss deduction shall be allowed;

"(4) The amount deductible on account of losses from sales or exchanges of capital assets shall not exceed the amount includible on account of gains from such sales or exchanges. The deduction provided in section 23(ee) shall not be allowed.

"(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business. For the purposes of this paragraph deductions and gross income shall be computed with the exceptions and limitations specified in paragraphs (1) to (4) of this subsection. This paragraph shall not apply with respect to deductions allowable for losses sustained after December 31, 1950, in respect of property, if the losses arise from fire, storm, shipwreck, or other casualty, or from theft.

"(6) There shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2 paid or accrued within the taxable year, subject to the following rules—

"(A) No reduction in such tax shall be made by reason of the credit for income, war-profits, or ex-

cess-profits taxes paid to any foreign country or possession of the United States;

"(B) Such tax shall be computed without regard to the adjustments provided in section 734; and

"(C) Such tax, in the case of a consolidated return for excess-profits tax purposes, shall be allocated to the members of the affiliated group under regulations prescribed by the Commissioner, with the approval of the Secretary.

* * * * * * * * * * *"

(NOTE: Section 304(c) of the Excess Profit Tax Act of 1950 makes Code Sec. 122(d)(6) inapplicable with respect to any taxable year ending after June 30, 1950.)

"SEC. 271. DEFINITION OF DEFICIENCY.

"(a) IN GENERAL.—As used in this chapter in respect of a tax imposed by this chapter, 'deficiency' means the amount by which the tax imposed by this chapter exceeds the excess of—

"(1) The sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

"(2) the amount of rebates, as defined in subsection (b)(2), made."

"SECTION 292. INTEREST ON DEFICIENCIES.

"(a) GENERAL RULE.—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any

portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion."

"SEC. 322. REFUNDS AND CREDITS.

* * * * * * * * * *

"(b) LIMITATION ON ALLOWANCE.—

"(1) PERIOD OF LIMITATION.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer."

"SEC. 505. SUBCHAPTER A NET INCOME.

"For the purposes of this subchapter the term 'Subchapter A Net Income' means the net income with the following adjustments:

"(a) ADDITIONAL DEDUCTIONS.—There shall be allowed as deductions.—

"(1) Federal income, war-profits, and excess-profits taxes paid or accrued during the taxable year to the extent not allowed as a deduction under section 23; but not including the tax imposed by section 102, section 500, or a section of a prior income-tax law corresponding to either of such sections.

* * * * * * * * * *"

"SEC. 507. MEANING OF TERMS USED.

"(a) GENERAL RULE.—The terms used in this subchapter shall have the same meaning as when used in chapter 1.

* * * * * * * * * *"

"SEC. 3770. AUTHORITY TO MAKE ABATEMENTS, CREDITS, AND REFUNDS.

"(c) RULE WHERE NO TAX LIABILITY.—An amount paid as tax shall not be considered not to constitute an overpay-

ment solely by reason of the fact that there was no tax liability in respect of which such amount was paid."

"SEC. 3771. INTEREST ON OVERPAYMENTS.

"(a) RATE.—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

"(b) PERIOD.—Such interest shall be allowed and paid as follows:

"(1) CREDITS.—In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921, 42 Stat. 227, or any subsequent Revenue Act, then to the date of the assessment of that amount.

"(2) REFUNDS.—In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 184—October Term, 1953.

Argued April 15, 1954 Decided July 14, 1954

Docket No. 22871

LEWYT CORPORATION (Now known as Lewyt Manufacturing Corporation), *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Before: CLARK, HINCKS and HARLAN, *Circuit Judges*

Petition to review a decision of the Tax Court determining a deficiency in petitioner's income taxes for the taxable year ended September 30, 1944, and a deficiency in excess profits taxes for the taxable year ended September 30, 1945. Tietjens, *Judge*. Affirmed.

FREIDIN & LITTAUER, New York City (Eugene Meacham, Fred R. Tansill and Seymour Sheriff, of Counsel) *for the petitioner.*

H. Brian Holland, Assistant Attorney General (Ellis N. Slack, Lee A. Jackson, and I. Henry Kutz, Special Assistants to the Attorney General, of Counsel) *for the respondent.*

HARLAN, *Circuit Judge*:

We are asked to review a decision of the Tax Court determining a deficiency of $7,129.21 in petitioner's income tax for the taxable year ended September 30, 1944, and

a deficiency of $466,557.19 in excess profits tax for the taxable year ended September 30, 1945. The taxpayer is a New York corporation engaged in the manufacture of vacuum cleaners and electronic devices. For tax purposes it used a fiscal year ending each September 30 and reported on an accrual basis. Each fiscal year referred to in this opinion will be designated simply by the calendar year in which it ended.

In the two years in question § 23(s) of the Internal Revenue Code [26 U. S. C. A. § 23(s)] provided that in computing net income there should be allowed as a deduction (from gross income) the "net operating loss deduction" provided in § 122 (26 U. S. C. A. § 122). Section 122(a) defines "net operating loss" as "the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d)." We are not concerned here with any of the provisions of subsection (d) except that contained in (d) (6) which permits the deduction of taxes "imposed by Subchapter E of Chapter 2 [excess profits taxes] paid or accrued within the taxable year," subject to certain rules not presently relevant. If a taxpayer has a net operating loss for a given taxable year, § 122(b)(1) and (2) and § 122(c) [1] provide that it may be applied, in

---

[1] "§ 122. Net operating loss deduction

• • •

(b) Amount of carry-back and carry-over.

(1) Net operating loss carry-back. If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

(2) Net operating loss carry-over. If for any taxable year the taxpayer has a net operating loss, such net operating loss

accordance with prescribed specifications, as a deduction in computing net income for the two preceding taxable years (called a "carry-back") and for the two succeeding taxable years (called a "carry-over"), the starting point being with the second preceding taxable year, and any excess being carried successively, until exhausted, into the subsequent years ending with the taxable year secondly succeeding the year in which the net operating loss occurred.

The taxpayer had net operating losses in each of the years 1946 and 1947, and the dispute we have before us relates primarily to (a) the proper computation of such losses for each of those years, and (b) the application of such losses to the years 1944 and 1945, in each of which the taxpayer had substantial taxable net income.

---

shall be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such intervening taxable year without regard to such net operating loss and without regard to any net operating loss carry-back. For the purposes of the preceding sentence, the net operating loss for any taxable year beginning after December 31, 1941 shall be reduced by the sum of the net income for each of the two preceding taxable years (computed for each such preceding taxable year with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and computed by determining the net operating loss deduction without regard to such net operating loss or to the net operating loss for the succeeding taxable year).

(c) Amount of net operating loss deduction. The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d) (1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26(e)) • • •"

We come first to the questions relating to the year 1945 in respect of which the Tax Court sustained the determination of the Commissioner that there was a deficiency in excess profits taxes of more than $460,000.

The Commissioner determined that in 1947 the taxpayer had a net operating loss of $786,383.25, which he allowed as a "carry-back" deduction to 1945. The taxpayer claimed additional "carry-backs" to 1945 aggregating $1,381,402.33 by reason of (a) the remittance to the Collector in 1947 of $300,008.87 in respect of excess profits taxes for the years 1943, 1944, and 1945 which, it is asserted, should have been added to the net operating loss for 1947; (b) the remittance to the Collector in 1947 of $55,949.04 interest on the foregoing amount and on some $12,000 of additional income taxes for 1943, which, it is claimed, should also have been added to the 1947 net operating loss; and (c) the failure to allow any portion of the net operating loss for 1946, claimed to be $1,025,444.42, as a "carry-back" to 1945. Each of these claims was denied by the Commissioner, who was sustained by the Tax Court. The taxpayer also contends that the Tax Court erred in failing to credit on the asserted excess profits tax deficiency for 1945 the sum of $108,437.36, which the taxpayer remitted to the Commissioner in 1947 in respect of 1945 excess profits taxes (this amount being part of the $300,008.87 referred to above).

1. *1947 Principal Remittances*

These remittances aggregating $300,008.87 were made under the following circumstances:

Prior to 1947, a dispute arose between the taxpayer and the Collector as to the taxpayer's 1943 tax liability. On August 30, 1946, the Collector issued a statutory notice asserting income and excess profits tax deficiencies for 1943 in the amount of $7,757.49 and $194,992.51, respectively. The taxpayer objected to these deficiencies and

took the matter to the Tax Court. Meanwhile, settlement negotiations were opened. On September 29, 1947, the taxpayer's auditor, believing that a formula for settlement had been reached, recomputed the tax liability for 1943 and sent the Collector a check for $190,002.16, of which $154,473.30 represented additional taxes for 1943 computed in accordance with the supposed settlement formula, and $35,528.86 the interest on such sum from December 15, 1943. The Collector deposited this check on September 29, 1947 in his "Suspense Account."

Notwithstanding this transaction, settlement conferences continued down to October 30, 1947, when they were broken off, the Head of the Technical Staff of the New York Division advising the Division Counsel on November 6, 1947 that a satisfactory settlement had not been reached and that defense of the case should proceed. However, negotiations were evidently resumed, for on February 24, 1948 a settlement stipulation was filed settling, among other things, the asserted 1943 excess profits tax deficiency for the sum of $140,147.87 which was $1,470.26 less than the amount attributable to excess profit taxes ($141,618.13) in the taxpayer's remittance of September 29, 1947.

On September 29, 1947, the taxpayer also forwarded to the Collector a check for $178,810.92, stated in the letter of transmittal to represent additional taxes of $49,953.38 for 1944, with interest in the amount of $8,492.07, and of $108,437.36 for 1945, with interest in the amount of $11,928.11. This remittance was predicated on a Revenue Agent's examination of the taxpayer's books for 1944 and 1945 (as well as 1946 and 1947), and a computation by the taxpayer's auditor applying in respect of excess profits taxes the same supposed settlement formula as underlay the taxpayer's remittance relating to 1943 excess profits taxes. Although no deficiency notice had been issued, and no settlement negotiations had been begun as to 1944 and 1945 taxes, the factors giving rise to the alleged excess profits tax deficiency for 1943 were deemed equally ap-

plicable to 1944 and 1945. The Collector also deposited this second remittance in his "Suspense Account."

The taxpayer charged on its books to earned surplus the principal amounts of these two remittances as tax payments, *viz*: $154,473.30 for 1943, $49,953.38 for 1944, and $108,437.36 for 1945. Of the first item, $12,855.17 represented income taxes (with which we are not concerned here) and the balance, aggregating $300,008.87, represented excess profits taxes. The interest payments on these three items were charged to 1947 expense on the taxpayer's books *viz*: $35,528.86 (1943), $8,492.07 (1944) and $11,928.11 (1945), or a total of $55,949.04.

The taxpayer's position that the $300,008.87 of remittances in respect of excess profits taxes should have been allowed as a deduction in computing the net operating loss for 1947 (thereby increasing the "carry-back" to 1945) rests upon § 122(d)(6). As heretofore noted, this section gives a deduction for "the amount" of excess profits taxes "imposed" which were "paid or accrued within the taxable year."

Preliminarily it should be said that while there is an issue relating to the computation of the 1946 net operating loss (which we discuss later) as to the correctness of the Tax Court's holding that in the case of an accrual taxpayer, as this taxpayer was, this section permits only the deduction of excess profits taxes which *accrued* within the taxable year, for the point now under discussion the taxpayer accepts the decision of the Tax Court in this respect as being correct. It can afford to do so since it is clear that none of these excess profits taxes had accrued prior to 1947 because they were in dispute—see *Dixie Pine Products Co.* v. *Comm'r*, 320 U. S. 516 (1944)—and whether they accrued in 1947 depends upon whether they can be considered as "paid" in that year despite the fact that the dispute over them was not settled until at least 1948. See *Chestnut Securities Co.* v. *United States*, 62 F. Supp. 574 (Ct. Cls. 1945), and *Lehigh Valley Railroad* v. *Comm'r*,

12 T. C. 977 (1949). So the sole question with which we are now concerned is whether these 1947 remittances constituted taxes "paid" within the taxable year, that is 1947, within the meaning of § 122(d)(6). We think they did not.

A remittance made in respect of an asserted or putative tax liability in no proper sense constitutes a tax "payment" except to the extent that it is effective to discharge such liability in whole or in part. That in turn depends upon the agreement of the taxpayer and the Commissioner or his representatives, acting within their powers, or upon whether the taxing authorities have a duty under the particular circumstances involved to accept the remittance as a payment of the tax in full or *pro tanto.*

Here there was admittedly no agreement in this respect between the taxpayer and the taxing authorities in 1947, and the only question is whether the Collector was, in the setting of these remittances, under a duty to accept them as "payments" *pro tanto* of the asserted or putative tax liabilities against Lewyt. We think he had no such duty. The taxpayer's 1943 tax liability was still in dispute on September 29, 1947, when these remittances were made. Settlement negotiations continued into 1948, and no settlement was reached until February 1948. Meanwhile the taxpayer's proceedings in the Tax Court remained alive. With respect to 1944 and 1945 taxes, the Revenue Agent had commenced his examination of the taxpayer's 1944 and 1945 returns, and it was clear that the same issues giving rise to the Commissioner's deficiency notice of August 30, 1946 as regards 1943 taxes were also involved for 1944 and 1945. So far as the record discloses, deficiency notices for 1944 and 1945 were not issued until February 16, 1950; and, in any event, it is clear that the controversy as to those issues present in the 1943 dispute, which were also applicable to 1944 and 1945, was active until at least 1948.

In these circumstances, we think that the action of the Collector in placing these 1947 remittances in his "Sus-

pense Account" to abide the event of the disposition of these disputes was quite proper. The taxpayer was not entitled to have these remittances treated as a satisfaction of its tax liabilities in whole or in part, and at the same time continue to contest such liabilities, or at best leave the Collector with an ambiguous situation on his hands.

Rosenman v. *United States*, 323 U. S. 658 (1945), while not reaching the precise point we have here, does support our view of the matter. In that case the Supreme Court held that the period of limitation on refund claims provided in § 910, I. R. C., requiring such claims to be presented within three years "after the payment of such tax," commenced to run from the time the Commissioner assessed the tax rather than from an earlier time when the taxpayer had made a general payment on account of estimated estate taxes. Stating that "payment" of a tax as contemplated by § 910, I. R. C., "plainly presupposes challenged action by the taxing officials" in response to which a remittance is made, the Court under the facts of that case held that no "tax payment" occurred until there had been an assessment followed by its satisfaction in part out of moneys already deposited with the Collector and in part by additional amounts paid by the taxpayer in response to such assessment, since it was only at that point that interest began to run against the Government on any amount in excess of that ultimately found due as the tax. While we do not read *Rosenman* to foreclose treating as a tax payment any remittance made prior to assessment, we do think that it supports the view that a remittance which does not *satisfy* an asserted tax liability should not be treated as the "payment" of a tax. Satisfaction may, as in *Rosenman*, follow from payment of a tax assessed, for such a payment extinguishes the asserted liability, even though the taxpayer is left with an independent claim for refund which survives the discharge of the assessment. Or it may follow from the payment of an asserted liability in advance of assessment, as appears to be contemplated by

§ 56(d), I. R. C., and 26 C. F. R. 601.13(b)(2),[2] *if*, as is expressly provided in the latter and by necessary implication in the former, the payment is accompanied by the taxpayer's acquiescence in the proposed deficiency. The same holds true as to § 271(a)(1)(B), requiring that amounts "collected without assessment" be excluded from the computation of a deficiency, for here again acquiescence by the taxpayer in such collections as constituting satisfaction of part of his tax liability is a condition necessarily to be implied. In short, there can be no payment without satisfaction whether pursuant to or apart from an assessment. Here the taxpayer was tendering its check with one hand, and contesting its liability to pay with the other. Its Tax Court proceedings as to the 1943 deficiency still stood, and that avenue was still open to it as to 1944 and 1945 taxes.

The taxpayer is quite mistaken, we believe, in reading *Rosenman* as standing for the proposition that the 1947 remittances should be treated as tax payments *ab initio* to the extent of the taxes ultimately found owing because they were effective to stop the running of interest against the taxpayer. The initial *Rosenman* payment was found not to be a tax payment despite the fact that the Court recognized that it stopped penalties and, as the Government conceded, interest *against the taxpayer*. It was found not to be a tax payment because it gave rise to no interest claim *against the Government*. The situation here is no different. Nor do we find such decisions as *Hanley* v. *United States*, 63 F. Supp. 73 (Ct. Cls. 1945), inconsistent with our conclusion, for there the taxpayer did not negative "payment" by simultaneous contest. Cf. *Murphy* v. *United States*, 78 F. Supp. 236 (S. D. Calif. 1948).

We hold that the 1947 remittances did not constitute "payment" of the taxpayer's 1943, 1944 and 1945 tax liabilities. They were no more than deposits "made in the nature

---

[2] See also informal ruling of Internal Revenue Bureau contained in Prentice-Hall Federal Tax Service, 1950, par. 76,331.

of a cash bond for the payment of taxes thereafter found to be due." *Rosenman*, at p. 662.

The taxpayer also argues that the Tax Court's order entered on the 1948 stipulation settling the 1943 excess profits tax liability binds the Government by way of collateral estoppel from now asserting that the 1947 remittance in respect of the 1943 tax was not a payment of the tax. We need not dwell on this contention. It seems clear (although the pleadings are not before us) that the settlement was concerned only with the *fact* of payment and not with its *date*. The item in the stipulation "Tax paid: September 29, 1947 (3rd NY)" does not persuade us that the question we now have before us was really at issue in the Tax Court.

2. *1947 Interest Payments*

For the same reasons the taxpayer's contention as to the deductibility of the 1947 interest payments in respect of 1943, 1944 and 1945 taxes must also fail.

3. *1946 Net Operating Loss*

The taxpayer challenges the determination of the Commissioner and the Tax Court as to the amount of the 1946 net operating loss.

As determined below, the net operating loss for 1946 was $164,326.38. The taxpayer argues that it should have been increased by $861,118.04, being the amount of the excess profits taxes which it paid in that year in respect of 1945.

This requires us to interpret the phrase "paid or accrued" in § 122(d)(6) permitting the deduction of excess profits taxes "paid or accrued within the taxable year" in the computation of the net operating loss under § 122(*a*). As already noted, it was unnecessary to reach this problem with respect to the 1947 net operating loss. The Tax Court held that "paid or accrued" meant that a *cash* taxpayer was entitled to deduct only excess profits taxes "paid,"

and an *accrual* taxpayer only those "accrued," within the taxable year, and that since Lewyt was an accrual taxpayer this sum of $861,118.04 could only be reckoned in Lewyt's tax computations for 1945. We think the Tax Court was right.

We start with the statute itself. Section 48(e), I. R. C., 26 U. S. C. A. § 48, provides that "when used in this chapter" (that is Chapter 1 entitled "Income Tax") "the terms * * * 'paid or accrued' shall be construed *according to the method of accounting upon the basis of which the net income is computed under this Part* [IV "Accounting Periods and Methods of Accounting"].[3] See also T. R. 29.43-1. Section 43, I. R. C., 26 U. S. C. A. § 43, captioned "Period for which deductions and credits taken," states: "The deductions and credits * * * provided for in this chapter [1] shall be taken for the taxable year in which 'paid or accrued' * * * dependent upon the method of accounting upon the basis of which net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period."

The taxpayer makes a number of arguments to avoid what we think to be the plain effect of these provisions. We consider first its argument based on legislative history. Section 202(a) of the Revenue Act of 1941 amended § 23(c) of the Internal Revenue Code to permit deduction of Chapter 2E excess profits taxes "paid or accrued within the taxable year" in computing net income, subject to certain rules provided in § 23(c)(2), one of which, "A," stated: "The deduction shall be limited to the tax *imposed* for the taxable year, but any portion of such tax paid *after* the taxable year shall be considered as having been paid *within* the taxable year * * *" The taxpayer here points out, and we think correctly, that this last quoted provision in effect placed cash and accrual taxpayers substantially on an *accrual* basis so far as the excess profits tax deduction was concerned. Then came the Revenue Act of 1942 which by

[3] All italics in this opinion have been supplied.

§ 105(c) eliminated Chapter 2E excess profits taxes as a deduction in computing net income, but added, by § 105 (e)(3)(C), a new Section, § 122(d)(6), permitting the deduction of such excess profits taxes from gross income in computing the net operating loss, and net operating loss "carry-backs" and "carry-overs," subject to rules which were the same as those presently contained in § 122(d)(6).

Pointing out that these rules are substantially the same as those formerly contained in § 23(c)(2) as amended by the Revenue Act of 1941, except that rule "A" of that section, quoted above, was omitted, the taxpayer argues that one of two inferences should be drawn—either that the Congressional intent was that the basis of deductibility of excess profits taxes should follow the taxpayer's method of accounting, *i.e.*, cash or accrual, or that in this respect the Act gave a taxpayer, whether cash or accrual, an election to deduct such taxes if either paid or accrued. It is urged that the latter inference is the more compelling, it being argued, as we shall see in a moment, that to draw the first inference would attribute to Congress an intention to "discriminate" between cash and accrual taxpayers, in that an accrual taxpayer, absent such an election, would rarely be able to take an excess profits deduction in a "loss" year.

We think that without more the arguments for and against these opposing inferences would at best present a stand-off. But we need not pause to examine them further, for here we have the explicit direction of § 43 that this deduction "shall be taken for the taxable year in which 'paid or accrued' * * * *dependent upon the method of accounting upon the basis of which net income is computed*, unless in order to reflect the income the deductions * * * should be taken as of a different period." Certainly the exception would have no application in this instance, and it appears not to be contended to the contrary.

Next, we are referred to *Commissioner* v. *Clarion Oil Co.*, 148 F. 2d 671 (D. C. Cir.), *cert. denied* 325 U. S. 881 (1945),

nd a line of cases following it, *Birmingham* v. *Loetscher* 'o., 188 F.2d 78 (8th Cir. 1951); *Aramo-Stiftung* v. *Comm'r*, 72 F. 2d 896 (2d Cir. 1949); and *Wm. J. Lemp Brewing* 'o. v. *Comm'r*, 18 T. C. 586 (1952), holding that the provisions of former § 356, I. R. C., now § 505(a)(1), I. R. C., 6 U. S. C. A. § 505, permitting the deduction of excess rofits taxes "paid or accrued during the taxable year" in omputing the surtax upon the undistributed net income f personal holding companies under § 500, I. R. C., 26 '. S. C. A. § 500, gives a taxpayer, whether cash or accrual, the option of taking this deduction on either basis. 'he ground of these decisions, as exemplified by *Clarion*, that the provisions of § 48(c) in Chapter 1 of the Internal Revenue Code defining "paid or accrued" in terms f a taxpayer's method of reporting for the purpose of omputing *net income* under that Chapter, have no application to the meaning of § 505(a)(1) permitting deduction f excess profits taxes for the purpose of computing the *ndistributed income* tax on personal holding companies nder Chapter 2. "But, obviously, this definition [48(c)] as intended to apply to the method of computing *net income*, and has no reference or relevancy to the subject natter of what, for the purposes of the newly added provision in relation to personal holding companies is taxable s *undistributed* income." Clarion, at p. 675. Stated otherise, Chapter 2 contains no provisions comparable to § 48(c) nd § 43 of Chapter 1 defining the phrase "paid or accrued."

The *Clarion* and the other cases cited are inapplicable to ne one before us. Here the meaning of "paid or accrued" § 122(d)(6) is directly involved in the computation of *t income*, for §23(s) allows as a deduction in "computing et income" under § 23 "the net operating loss deduction omputed under Section 122." In addition, to the extent hat the meaning of "paid or accrued" is involved in the omputation of the net operating loss itself by application f the § 122(d)(6) deduction, § 43 specifically gives it the ame meaning as § 48(c) requires in connection with the omputation of net income.

The third contention which the taxpayer presses upon us is that to construe § 122(d)(6) as we do discriminates against the accrual taxpayer. The argument is that in the nature of things it is usually impossible for a taxpayer to incur in the same year both an excess profits tax liability and a net operating loss. Therefore, it is said, an *accrual* taxpayer in most cases will be unable to get the benefit of the § 122(d)(6) adjustment in calculating his net income, while a *cash* taxpayer normally will. Take this hypothetical situation as illustrative of the taxpayer's point. A corporation had high profit years in 1942 and 1943 and incurred a $1,000,000 excess profits tax liability in the latter year, which it paid in 1944. In 1944 it had a net operating loss of $500,000, without regard to any § 122(d)(6) adjustment. If an *accrual* taxpayer, the corporation would not be able to add its excess profits taxes for 1943 to its net operating loss for 1944; if a *cash* taxpayer it would; and this in turn would mean that the cash taxpayer's net operating loss "carry-back" to 1942 and 1943 under § 122(b)(1) would be increased by $1,000,000, whereas the accrual taxpayer's "carry-back" would remain at $500,000.

We may conceive of situations where the accrual taxpayer is not put at this disadvantage with the cash taxpayer. One such is a situation where, as in the case of this taxpayer's 1943 excess profits taxes, accrual of the excess profits tax liability has been postponed because of a dispute concerning it, and the time of payment and accrual therefore coincide. See *Robert Reis & Co.* v. *Comm'r*, 20 T. C. 294 (1953). Nevertheless, we would not be candid if we failed to recognize the force of what the taxpayer argues here. But however sympathetic one may be to this predicament of an accrual taxpayer—a phenomenon by no means unique under the tax laws—we would not be justified in ignoring the plain mandate of the statute.

Finally, on this point the taxpayer gives us the decision of the Court of Claims in *Olympic Radio and Television, Inc.* v. *United States*, 108 F. Supp. 109 (1952), *re-hearing*

denied 110 F. Supp. 600 (1953), which squarely upholds the position of the taxpayer as to the meaning of "paid or accrued" in § 122(d)(6). We have given careful and respectful consideration to the two opinions of the majority in that case, which were based largely on the same considerations urged upon us by the taxpayer here, and find ourselves unable to agree with the Court of Claims.

4. *1946 Net Operating Loss "Carry-Back"*

Now we come to the issue involving the "carry-back" of the 1946 net operating loss to 1944 and 1945. As previously noted, § 122(b)(1) requires that such loss be applied first to the year 1944 and the excess, if any, to 1945. That excess is the amount by which the 1946 operating loss exceeds the income for 1944 "computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6) [of § 122] *and* (B) by determining the net operating loss *deduction* for such second preceding taxable year [1944] without regard to such [1946] net operating loss." § 122(b) (1) and § 122(c).

In terms of the present case, the situation is this: The taxpayer's 1944 income, as to which there is no dispute, was $584,866.81, *without regard* to any § 122(d) (6) adjustment or the 1946 net operating loss deduction under § 23(s). There was no net operating loss for 1944. The net operating loss for 1946, as determined by the Commissioner, was $164,326.38, and we have already disposed of the contention that it should have been increased by $861,118.04, the amount of the excess profits taxes paid by the taxpayer in 1946 in respect of 1945.

The taxpayer contends that in computing the amount of the 1946 net operating loss ($164,326.38) which is to be carried back to 1945, there should first be offset against 1944 net income ($584,866.81) either (a) the sum of $759,916.50, being the amount of the 1943 excess profits taxes reflected in the taxpayer's return for that year and *paid*

by it in 1944, or (b) the sum of $625,561.59, being the amount of the 1944 excess profits taxes as reflected in the taxpayer's return for 1944 and which it claims *accrued* in 1944. Since under (a) the 1943 excess profits taxes *paid* in 1944 ($759,916.50) exceeded by $175,049.69 the unadjusted net income for 1944 ($584,866.81) and under (b) the 1944 excess profits taxes *accrued* for that year ($625,561.59) exceeded by $40,694.78 such net income for 1944 ($584,866.81), the taxpayer claims that the entire 1946 net operating loss ($164,326.38) constitutes a "carry-back" to 1945. We cannot agree.

What we have already held as to the meaning of "paid or accrued" in § 122(d) (6) in connection with the computation of the 1946 net operating loss equally applies to the § 122(d) (6) adjustment to 1944 net income, and disposes of the contention that for this purpose the taxpayer was entitled to deduct from such income the 1943 excess profits taxes *paid* in 1944.

The other contention must also fail. The excess profits taxes ultimately found by the Commissioner to be due in respect of the year 1944 were $280,540.33, and not $625,561.59, as originally reported in the taxpayer's 1944 return, and we think it was this figure rather than the uncorrected figure which represented the measure of the § 122(d) (6) adjustment to 1944 net income. Section 122(d) (6) allows the deduction of "the amount" of excess profits taxes "imposed" and (in the case of an accrual taxpayer) "accrued within the taxable year." The tax which was "imposed" for 1944 was $280,540.33, and that in our opinion was "the amount" of the tax which "accrued" in 1944 for purposes of this adjustment. True, it has been held that when all the events necessary to determine the amount of a tax have occurred within a taxable year, the tax as reported in that year constitutes the tax "accrued" despite the occurrence of later events which change the amount of the tax ultimately found due. See *United States* v. *Detroit-Moulding Corp.*, 56 F. Supp. 754 (E. D. Mich.

1944). But if we are to follow this view we should also take the *income* as originally reported in the 1944 return, *viz.*, $827,852.99 instead of $584,866.81 as finally determined by the Commissioner. What the taxpayer is seeking to do is to have the benefit of both the *smaller* 1944 income as finally determined ($584,866.81) and the *larger* excess profits tax ($625,561.59), based upon the income as originally reported. The taxpayer must match either the *returned* income ($827,852.99) against the *returned* excess profits tax based thereon ($625,561.59), or the *determined* income ($584,866.81) against the *determined* excess profits tax ($280,540.33). It cannot have it both ways at the same time by matching *determined* income against *returned* excess profits taxes. And we think it is *determined* income and excess profits taxes that represent the proper § 122 (d) (6) adjustment, since the manifest purpose of the "carry-back" and "carry-over" provisions of the statute, § 122(b) (1), (2) is that the incidence of this kind of taxation upon a business enterprise shall in effect be looked at from the vantage point of a five year period, that is the current taxable year plus two "carry-back" and two "carry-over" taxable years.

In light of this wearisome discussion, we think that the correct situation as to the 1946 "carry-back" was this: The taxpayer's 1944 net income, before the § 122(d) (6) and § 23(s) adjustments, was $584,866.81. The excess profits taxes which accrued for 1944 were $280,540.33. After the § 122(d) (6) adjustment ($584,866.81 *minus* $280,540.33), the balance of 1944 income was $304,326.48. Since this was greater than the net operating loss for 1946 ($164,326.38), this resulted, as the Commissioner and Tax Court determined, in there being nothing left from the 1946 net operating loss to "carry back" to 1945. It likewise resulted in there being taxable income for 1944.

5. Computation of 1945 Excess Profits Tax Deficiency

In computing the excess profits tax deficiency for 1945, the Commissioner apparently gave no credit for the $108,437.36 remitted by the taxpayer on September 29, 1947. The taxpayer asserts this was an amount "collected without assessment" which under § 271(a)(1)(B) the Commissioner was required to take into account in computing the 1945 deficiency. See *McConkey* v. *Comm'r*, 199 F. 2d 892 (4th Cir. 1952), *cert. denied* 345 U. S. 924 (1953); *Bendheim* v. *Comm'r*, 2d Cir., decided June 9, 1954.

For the reasons already discussed, we think that this would be so only if the remittance were made under circumstances which would constitute it a satisfaction of a tax liability in whole or in part. In the *McConkey* and *Bendheim* cases, *supra*, the taxpayers made remittances similar to that now under consideration. Each of those remittances was deposited in the Collector's "Suspense Account" and stood, under the authority of the *Rosenman* case, as "a cash bond for the payment of taxes thereafter found to be due," or, in effect, as a continuing offer by the taxpayer to the Collector that he apply the amount to the discharge of a tax liability in whole or in part. And in each of those cases the Collector, after these deposits with their implicit offers had been made, stated a proposed deficiency not in excess of the deposit, thereby indicating unequivocally an acceptance of the taxpayer's offer. Accordingly, the amounts became "collected without assessment" within the meaning of § 271(a)(1)(B), and the taxpayer's sole remedy remaining was an independent suit for refund.

Here, however, the Collector did not accept, explicitly or implicitly, the taxpayer's remittance as a discharge of its tax liability, in whole or in part, nor could he be forced to do so while that liability was still in dispute. Indeed, no deficiency had yet been proposed in 1947. But in 1948 the Revenue Agent proposed a deficiency in excess of the taxpayer's remittance, as to which the Commissioner issued

his deficiency notice on February 16, 1950, and which the taxpayer was free to, and did, contest; and certainly the Commissioner for his part was not required to circumscribe his position in the ensuing litigation in the Tax Court by making application of such remittance to the asserted tax liability. In other words, until the Commissioner, with unequivocal authority of the taxpayer, applied or was required to apply the $108,437.36 remittance as a satisfaction, in whole or in part, of the asserted tax liability, this remittance did not constitute an amount "collected without assessment" within the meaning of § 271, but continued as no more than a deposit voluntarily made by the taxpayer.

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of July one thousand nine hundred and fifty-four.

Present: HON. CHARLES E. CLARK, HON. CARROLL C. HINCKS, HON. JOHN M. HARLAN, *Circuit Judges.*

LEWYT CORPORATION (Now known as Lewyt Manufacturing Corporation), *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Appeal from The Tax Court of the United States.

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

/s/ A. DANIEL FUSARO, *Clerk.*